Champion Home Builders Co. a Subsidiary of Champion Enterprises Inc. *and* Carpenters Union Local No. 1109, a/w United Brotherhood of Carpenters & Joiners of America, AFL–CIO. Case 32–CA–17185

November 19, 2004

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On May 16, 2000, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions in part, reverse them in part, and to adopt the recommended Order as modified and set forth in full below.[2]

1. The judge found, and we agree, that the Respondent discharged Ramon Rivas in violation of Section 8(a)(1). In adopting this finding, we note that the judge's findings regarding Rivas' concerted activity and the Respondent's knowledge of Rivas' concerted activity are consistent with *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), and *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).[3]

2. The judge also found that the Respondent violated Section 8(a)(1) by failing and refusing to stay or seek the dissolution of the restraining order issued against Rivas by the California State court. For the reasons explained below, we reverse and dismiss this allegation.

The relevant facts are as follows. The Respondent discharged Rivas on or about December 18, 1998.[4] Soon thereafter, the Respondent initiated legal proceedings in the Superior Court of California, County of Tulare (the State court) to seek a restraining order against Rivas (Case 98–185198). Specifically, on December 23, the Respondent filed an Order to Show Cause and Application for Temporary Restraining Order (TRO) against Rivas in the State court. The next day, Rivas was served with a TRO issued by the State court. The TRO prohibited him from, inter alia, coming within 100 yards of the Respondent's facility or contacting Plant Manager Jim Stewart or any of the Respondent's employees. Following the hearing to show cause, the State court issued a restraining order on January 7, 1999, prohibiting Rivas from, inter alia, coming within 50 yards of the Respondent's facility and contacting the Respondent's employees during working hours.[5] On March 30, 1999, the General Counsel issued a complaint alleging that the Respondent had unlawfully discharged Rivas.

In a letter dated September 1, 1999, the Regional Director demanded that the Respondent request the State court to withdraw the restraining order. The Respondent refused to do so. On September 3, 1999, the General Counsel issued an amended complaint containing an additional allegation that the Respondent violated Section 8(a)(1) by failing and refusing to stay or seek dissolution of the TRO.[6]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order to conform to our findings. We shall also modify the recommended order to clarify that the date of the Respondent's unfair labor practice was December 18, 1998.

We shall also substitute a new notice to conform to our findings and the Board's standard remedial language, and to conform with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

[3] The record supports the judge's finding that Rivas' conduct was concerted. Rivas testified that he discussed his concerns about bonuses with coworkers on several occasions, and that some of his fellow employees agreed and encouraged him to bring the matter up at a safety meeting. Further, at the time of his discharge, Rivas told the company manager, in response to his inquiry, that 50 or 60 employees agreed with Rivas' suggestion letter.

[4] All dates refer to 1998 unless otherwise indicated.

[5] Rivas appeared pro se at this hearing.

[6] Par. 8 of the amended complaint states:

> (a) On or about December 23, 1998, Respondent filed an Order to Show Cause and Application for Temporary Restraining Order (TRO) against Ramon Rivas seeking a three year restraining order banning him from its premises, as well as restricting him from contacting its employees.
>
> (b) On or about January 7, 1999, the Superior Court for the County of Tulare granted Respondent's request for a three year TRO which is currently pending.

Par. 9 states:

> (a) On or about March 30, 1999, the original Complaint in this matter issued alleging that Respondent had discriminatorily discharged Ramon Rivas.
>
> (b) The TRO was pre-empted by the Act upon issuance of the discriminatory discharge Complaint.
>
> (c) Since on or about March 30, 1999, Respondent has failed and refused to attempt to stay or to seek a dissolution of the TRO.

We note that although the quoted portions of the complaint refer to "a three year TRO which is currently pending," the State court actually issued a "Restraining Order after Hearing" on January 7, 1999, which expired on January 7, 2002. Thus, the Restraining Order after Hearing superseded the TRO issued on or about December 24. See Calif. Code of Civil Procedure Sec. 527.6(c) and (d). This inadvertent error does not affect our disposition of the allegation.

In analyzing the allegation that the Respondent violated Section 8(a)(1) by failing to stay or seek the dissolution of the lawsuit upon issuance of the unlawful discharge complaint, the judge framed the issue as "whether the [State court] injunction which conflicts with reinstatement is preempted by the Act."[7] He ultimately found that, although the issue before the State court was not identical to the issue before the Board—i.e., the allegation that Rivas was unlawfully discharged was not before the State court–the State court's restraining order (or injunction as the judge referred to it) conflicted with the Board's remedy for Rivas's unlawful discharge. Given the Board's exclusive statutory authority to adjudicate unfair labor practice allegations, the judge reasoned that the reinstatement remedy preempted the State court restraining order which, as stated above, barred Rivas from entering the Respondent's property.[8] The judge essentially concluded that preemption of the restraining order occurred upon issuance of the Board's *remedy* for Rivas's unlawful discharge because the terms of the restraining order would preclude Rivas's reinstatement. Based on this analysis, he found that the Respondent violated 8(a)(1) by failing to withdraw its lawsuit against Rivas upon issuance of the "amended complaint."[9]

The judge's analysis, however, fails to explain why the State court lawsuit was preempted upon issuance of the complaint alleging that Rivas had been unlawfully discharged, and why it was unlawful for the Respondent to fail to stay or seek the dissolution of the lawsuit as subsequently alleged. *Loehmann's Plaza*,[10] which the judge cited, does not support his finding. *Loehmann's Plaza* involved a State court lawsuit specifically directed at employees' *protected* activity of peaceful picketing and handbilling on private property. By contrast, the lawsuit in the instant case was directed at Rivas' allegedly *unprotected* activity, namely, threats of violence.[11] The lawsuit did not address Rivas' protected, concerted activity, i.e., his posting a letter on a bulletin board, which was the focus of the complaint. In light of the fact that the controversies before the Board and the court were different, a preemption finding here is inappropriate. See *Sears Roebuck & Co. v. Carpenters*, 436 U.S. 180, 197 (1978) (in determining whether the Act will preempt a State court action, the issue "is . . . whether the controversy presented to the State court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board").

Further, the Supreme Court has explicitly held that the Act does not preempt a State court injunction enjoining, inter alia, acts of violence, intimidation, and threats of violence. *Youngdahl v. Rainfair*, 355 U.S. 131, 139 (1957) (affirming portion of State court injunction enjoining picketers and others cooperating with them from threatening violence against or provoking violence by respondent's employees). This is so, "because nothing in the federal labor statutes protects or immunizes from state action . . . the threat of violence in a labor dispute." *Farmer v. Carpenters*, 430 U.S. 290, 299 (1977). Accord: *Sears Roebuck & Co. v. Carpenters*, 436 U.S. at 195, 204; *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959). Thus, nothing in the Act prevented the State court from enjoining Rivas from engaging in acts of violence or intimidation. In sum, the State court lawsuit was not preempted upon issuance of the complaint alleging that the Respondent had unlawfully discharged Rivas. Accordingly, we reverse the judge and dismiss the allegation that the Respondent violated 8(a)(1) by failing to stay or seek the dissolution of its State court lawsuit against Rivas.

Our dissenting colleague contends that "[t]he evidence does not support a claim that the lawsuit against Rivas was actually based on threats of violence." He argues that, because the administrative law judge—unlike the State court judge who granted the temporary restraining order—ultimately deemed pretextual Respondent's claim that Rivas threatened his supervisors, the Respondent's lawsuit lacked merit and was preempted upon issuance of the March 1999 unfair labor practice complaint.

The primary difficulty with our colleague's position is that it turns on a credibility-based determination made by an administrative law judge nearly a year and a half after the allegations of imminent violence were presented to and acted upon by the State court. Our colleague apparently would force employers to choose between acting in response to alleged threats of violence and facing the consequences of a subsequent finding of Federal preemption. In short, here, the Respondent would have been deprived of a State remedy until the Board issued its decision. We deem that to be an imprudent approach in

[7] See sec. II,B of the judge's decision.

[8] Id.

[9] See par. 4 of the judge's "conclusions of law." As shown above, however, the amended complaint alleged that the Respondent's failure to stay or seek the dissolution of the State court lawsuit upon issuance of the March 30 complaint was unlawful.

[10] *Loehmann's Plaza (Loehmann's Plaza I)*, 305 NLRB 663, 669 (1991), revd. on other grounds *Loehmann's Plaza (Loehmann's Plaza II),* 316 NLRB 109 (1995), rev. denied sub nom. *Commercial Workers, Local 880 v. NLRB*, 74 F.3d 292 (D.C. Cir. 1996), cert. denied sub nom. *Teamsters Local 243 v. NLRB*, 519 U.S. 809 (1996).

[11] Member Meisburg notes that he believes employers are entitled to take threats of violence by employees with the utmost seriousness and that the Board should treat claims of preemption narrowly where legal proceedings initiated by employers are based on such threats.

cases involving alleged threats of potentially imminent violence—conduct plainly unprotected under the Act.

Our dissenting colleague incorrectly claims that it is "uncontroverted" that the Respondent's State court lawsuit against Rivas was unsupported by any evidence suggesting that Rivas had engaged in threatening or violent behavior. This is not so. Under California law, upon a plaintiff's filing a petition for injunction, "[a] temporary restraining order may be issued with or without notice upon an affidavit that, *to the satisfaction of the court, shows reasonable proof of harassment of the plaintiff by the defendant, and that great or irreparable harm would result to the plaintiff.*" Cal.C.C.P. § 527.6 (c). (Emphasis added.) Within 15 days—or sometimes longer—from the date the temporary restraining order issues, the statute requires that "a hearing shall be held on the petition for the injunction." The defendant is permitted to file a response. "At the hearing, the judge shall receive any testimony that is relevant, and may make an independent inquiry. If the judge finds *by clear and convincing evidence* that unlawful harassment exists, an injunction shall issue prohibiting the harassment." Cal.C.C.P. § 527.6 (d). (Emphasis added.) It is undisputed that, following the issuance of the temporary restraining order, Rivas appeared pro se at the hearing on the petition for injunction and had an opportunity to defend against Stewart's claims.

Stewart's successful petition for an injunction obviously met the evidentiary standards established by California's civil rules. Contrary to our colleague's characterization of the lawsuit, the record is clear that Stewart's evidentiary attachments to his December petition for an injunction against Rivas contain assertions that go well beyond the mere checking off of boxes on a "pre-printed application form." The petition requires the plaintiff to "[d]escribe in detail the most recent details of abuse [and to] [s]tate what happened, the dates, and who did what to whom." Stewart, in turn, attached a detailed narrative, describing Rivas' alleged harassment of his coworkers. Stewart also alleged, among other things, that on December 21 Rivas refused a manager's request to leave the premises, and that, during a subsequent meeting with Stewart, Rivas told Stewart that he "had better 'be careful' or that he "would be sorry."

Our colleague's reference to Labor Relations Manager Gayle Lucas' description of a postdischarge meeting "between Stewart, Lucas, and Rivas" is beside the point. In his attachment to the petition for an injunction, Stewart described *his* recollection of the December 21 meeting with Rivas. Finally, our colleague's assertion that the "impetus" for the lawsuit against Rivas somehow came from an official at the Respondent's headquarters is entirely immaterial. The record shows that Stewart consulted other officials for advice as to how to handle the situation with Rivas. In no way does this detract from the uncontroverted fact that the court found merit to *his* allegations.

Our colleague states that "[his] position here is certainly not an attempt to force an employer to forego acting in response to alleged threats of violence, where the employer's allegations of such threats are honestly made, and not, as here, pretextual." Given that our colleague would find that the Respondent unlawfully refused to withdraw its meritorious lawsuit *upon issuance of the General Counsel's complaint* alleging Rivas' unlawful discharge, and would find the lawsuit preempted at this point, it is difficult to discern how his position can avoid turning the General Counsel into the ultimate arbiter of the merits of a successful State court restraining order.

In striking the proper balance between a state's undisputed and compelling need to prohibit violence and the Board's prerogative to remedy unfair labor practices, we find it unnecessary, in this case, to deny the Respondent its right to maintain a State court restraining order. As we see it, the better approach is to allow the restraining order to coexist with the unfair labor practice complaint, and to find preemption only at the point the Board issues an order containing a remedy that conflicts with the State court lawsuit.

However, we acknowledge that our remedy requiring the Respondent to reinstate Rivas conflicts with the part of the restraining order prohibiting Rivas from entering the Respondent's property and contacting employees during working hours. Thus, as part of the remedy for Rivas' unlawful discharge, we order the Respondent to petition the court to withdraw those portions of its restraining order.[12]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that the Respondent, Champion Home Builders Co., Lindsay, California, its officers, agents, successors, and assigns, shall take the action set forth below.

1. Cease and desist from

(a) Discharging employees in order to discourage protected concerted activities.

[12] We would not require the Respondent to petition the court to withdraw the portions of its lawsuit that do not conflict with Rivas' reinstatement, i.e., the portions prohibiting him from, inter alia, molesting, harassing, striking, battering, attacking, threatening, stalking, and disturbing the peace of or destroying the property of the protected persons.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer full reinstatement to Ramon Rivas to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Ramon Rivas whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to Ramon Rivas' unlawful discharge, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Petition the court to withdraw the portion of the lawsuit in Case 98–185198 filed in Superior Court of California, County of Tulare, against Ramon Rivas prohibiting Rivas from entering the Respondent's property and contacting its employees during working hours.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, timecards, social security payment records, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Lindsay, California facility copies of the attached Notice marked Appendix.[13] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the attached notice to all current employees and former employees employed by the Respondent at any time since December 18, 1998.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

[13] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER WALSH, concurring and dissenting in part.

I agree with my colleagues that the Respondent discharged Ramon Rivas in violation of Section 8(a)(1) of the Act. I disagree with my colleagues, however, that the Respondent did not also violate Section 8(a)(1) as found by the judge by failing and refusing to stay or seek the dissolution of the restraining order against Rivas, issued by the California State court, that barred Rivas from the Respondent's facility and from communicating with employees at that facility. Contrary to the judge, however, I find this violation for the reasons stated in *Loehmann's Plaza I*[1] as discussed below.

The judge found that the State court's restraining order against Rivas, barring him from entering the Respondent's property, was preempted by the Act because it conflicted with the Board's remedy for Rivas' 8(a)(1) discharge, requiring him to be reinstated to the Respondent's employment. Thus, the judge essentially concluded that the Act's preemption of the restraining order occurred upon issuance of the Board's reinstatement remedy for Rivas' unlawful discharge. Accordingly, the judge found that the Respondent violated Section 8(a)(1) by failing and refusing to stay or seek the dissolution of the restraining order, and he ordered the Respondent to withdraw its lawsuit.

Under *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978), when the Board issues a decision finding conduct protected, the Board's decision and remedy preempts any State court action. *Loehmann's Plaza I*, supra at 669. However, the instant September 3, 1999 amended complaint alleged that the State court lawsuit had been preempted upon issuance of the March 30, 1999 original complaint that alleged Rivas' unlawful discharge. Because the judge did not squarely address this allegation or provide a rationale that is consistent with finding a violation based on this allegation, I shall do so below.[2]

[1] *Loehmann's Plaza (Loehmann's Plaza I)*, 305 NLRB 663, 669–672 (1991), revd. on other grounds *Loehmann's Plaza (Loehmann's Plaza II)*, 316 NLRB 109 (1995), rev. denied sub nom. *Commercial Workers Local 880 v. NLRB*, 74 F.3d 292 (D.C. Cir. 1996), cert. denied sub nom. *Teamsters Local 243 v. NLRB*, 519 U.S. 809 (1996).

[2] In the "Conclusions of Law" section of his decision, the judge stated, that, "[b]y not withdrawing its [State court lawsuit], after issuance of the *amended complaint*, Respondent violated Section 8(a)(1) of

Loehmann's Plaza I, supra, provides the relevant framework. In that case, the Board held that "the filing or active pursuit of a State court lawsuit seeking to enjoin protected peaceful picketing *after the point of preemption—when a complaint issues concerning the same activity*—tends to interfere with Section 7 rights thereby violating Section 8(a)(1) of the Act." *Loehmann's Plaza I*, supra at 671 (emphasis added). "[T]he General Counsel's decision to issue a complaint signifies that a showing has been made that the [alleged unlawful activity] is arguably protected by the Act." Id. And, "if there is a pending State court lawsuit when a complaint issues, the respondent has the burden to show that it has taken affirmative action to stay the State court proceeding within 7 days of the issuance of the complaint. If there is an outstanding injunction when a complaint issues, the respondent has 'the burden to show that it has taken affirmative action to have the injunction withdrawn within 7 days of the issuance of the complaint." Id. (Footnote omitted).[3]

Here, the General Counsel's decision to issue a complaint on March 30, 1999, signified that he believed that Rivas was discharged for engaging in "arguably protected activity." More specifically, during 1998,[4] Rivas repeatedly discussed his dissatisfaction with the Respondent's employee production bonus system with about 20–30 fellow employees and with his supervisor. On December 18, Rivas posted a letter to the Respondent on the bulletin boards in the lunchroom and the work area that complained about how the Respondent computed employee production bonuses. Later that day, Production Superintendent Scott and Human Relations Manager Lucas together interviewed five employees separately about the letter. These employees variously complained to Scott and Lucas about the letter, stating that they did not agree with it, and two of them complained about Rivas interrupting their work with his complaints. After interviewing these employees, Scott discharged Rivas. Rivas told Scott that Scott could not discharge him because of the letter, and that Scott needed a good reason to discharge him. Scott replied, "I don't like the way you work. Now can I fire you?" Rivas was not, however, given a written explanation at this time for the discharge.

Scott told Rivas' supervisor to escort Rivas from the facility and told Rivas that he was not allowed to speak with any employees. Rivas returned to the facility on the following workday, December 21, to speak to Plant Manager Stewart about the discharge. Scott intercepted Rivas and summoned a deputy sheriff to the facility. Scott told the deputy that Rivas had been discharged and that Scott wanted Rivas to be removed from the Respondent's property. Rivas then left. He unsuccessfully tried to get his job back in a meeting with Stewart later that day in Stewart's office.

Two days later, on December 23, the Respondent sent Rivas a separation notice. The notice, however, does not recount or describe any particular alleged misconduct by Rivas, but instead only asserts that Rivas was discharged because he violated four specified work rules. Copies of the pages from the Respondent's employee information handbook on which those rules appear are attached to the separation notice. The four specified rules prohibit (1) unnecessarily interrupting other employees in the performance of their work for nonwork related matters, (2) posting letters on bulletin boards without the Respondent's approval, (3) dishonest acts or falsification of company or work records, and (4) threatening to physically harm or intimidate a supervisor or employee.

My colleagues and I agree that Rivas was unlawfully discharged, in violation of Section 8(a)(1) of the Act, because of his protected concerted activity in complaining to other employees about the Respondent's employee production bonus system and posting the letter complaining about it.

The same day that the Respondent gave Rivas his notice of separation, December 23, it also filed in State court a petition for injunction prohibiting harassment and an application for a temporary restraining order against him. The Respondent's asserted reasons for seeking a temporary restraining order against Rivas were, inter alia, that Rivas had threatened to commit acts of violence against Stewart and the Respondent's employees; Rivas had committed a series of acts that seriously alarmed, annoyed, or harassed Stewart and the Respondent's employees; that Rivas allegedly posed a danger to the safety

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the Act." (Emphasis added.) As stated above, however, the judge's decision does not contain a rationale for why the violation occurred upon issuance of the "amended complaint." Further, in adopting the judge's conclusion, I find that the violation occurred upon issuance of the March 30, 1999 original complaint, not the September 3, 1999 amended complaint.

[3] Further, retaliatory motive is not a necessary element in cases involving the lawfulness of preempted State court lawsuits:

> [A]t the point of preemption, the special requirements of [*Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983)] do not apply. Rather, the 'normal' requirements of established law apply.
>
> Under settled principles, a violation of Section 8(a)(1) is established if it is shown that the employer's conduct has a tendency to interfere with a Section 7 right. Accordingly, if the Board in the unfair labor practice proceeding finds that the [arguably protected activity alleged in the complaint] is protected by Section 7, and if a preempted State court lawsuit is aimed at enjoining that Section 7 activity, it is clear that the lawsuit tends to interfere (indeed, it is designed to stop) the exercise of a Section 7 right. Accordingly, the lawsuit is unlawful under Section 8(a)(1).

Id. at 671 (footnotes omitted).

[4] All of the following dates are 1998 unless otherwise stated.

of Stewart and the Respondent's employees if he went "postal" (the Respondent's term), assertedly because it was evident from Rivas' behavior that he was mentally and emotionally unstable; that Rivas had been harassing other employees; and that the Respondent had received complaints from other employees about Rivas handing out letters to other employees about the Respondent's Christmas bonuses.

The evidence does not support a claim that the lawsuit against Rivas was actually based on threats of violence. As the judge found, when Respondent Production Superintendent Scott sought to evict Rivas from the Respondent's premises on the first workday following Rivas' unlawful discharge, Scott made no claim to Deputy Sheriff Saldivar that Rivas had made any threats. Likewise, in the papers filed in State court 2 days later, seeking the restraining order against Rivas, the Respondent also made no affirmative reference to any threats of violence or bodily harm by Rivas. Rather, the Respondent had merely placed an "x" in a box next to the preprinted statement on the court's application that "5. Defendant has . . . (a.) threatened to commit acts of violence against plaintiff(s)." In the Respondent's accompanying narrative statement in support of its application for a temporary restraining order, however, it does not specifically describe or even assert any such "acts of violence." Finally, in concluding that Rivas had been unlawfully discharged in retaliation for his protected concerted activities, the judge found, and my colleagues and I agree, that the Respondent's assertion that Rivas threatened employees and supervisors was false and unlawfully motivated.

My colleagues assert that my position turns on a credibility-based determination made by the judge nearly a year and a half after the Respondent's allegations of imminent violence were presented to and acted upon by the State court. My position does not turn on that at all. This aspect of my position rests on the uncontroverted facts set forth in the preceding paragraph. Those facts establish that the Respondent's bare claim in State court that "Defendant has . . . threatened to commit acts of violence against plaintiffs" was unsupported from the start by any evidence suggesting that Rivas had engaged in anything even akin to violent behavior. The judge's confirmation of that fact later on did not serve as the Respondent's first notice of its own evidentiary shortcomings.

Indeed, the impetus for getting a restraining order did not come from Stewart or Scott, but instead from Respondent Western Regional Vice President Barker, who told Stewart by telephone following Rivas' discharge to get a restraining order because *Barker* had had "some violence at several plants with ex-employees."

Lucas did prepare a typed summary of the December 21 postdischarge meeting between Stewart, Lucas, and Rivas. The summary attributes some subjectively "menacing" and physically threatening behavior to Rivas prior to the meeting that day. While the judge did discredit Lucas' summary, it was in any event not available to the Respondent until several days after the Respondent filed its December 23 application for a restraining order, and there is no evidence that the Respondent later submitted the summary in support of its request. Thus, the record shows that the allegations of imminent violence from Rivas that were presented to the court as the asserted grounds for the requested restraining order were lacking in support from the start.

On December 23, the State court issued the requested temporary restraining order against Rivas, and on January 7, 1999, it issued a 3-year restraining order against him, effective through January 7, 2002, prohibiting him from, inter alia, being within 50 yards of the Respondent's facility and contacting the Respondent's employees during working hours.

On March 30, 1999, the General Counsel issued his original complaint in the instant proceeding, alleging in pertinent part that the Respondent discharged Rivas because Rivas engaged in protected concerted activities for the purposes of mutual aid or protection, including voicing complaints about the Respondent's granting of bonuses.[5] Thus, by the time the General Counsel issued the complaint alleging Rivas' unlawful discharge, the State court's restraining order against Rivas had been in effect for almost 3 months.

The conflict between Rivas' arguably protected activity and the Respondent's State court lawsuit against Rivas is evident: Rivas' engaging in arguably protected activity led the Respondent to fire him, which, in turn, prompted the Respondent to file the State court lawsuit against Rivas to keep him away from the Respondent's managers and employees following his discharge.[6]

It is clear from the documents and allegations submitted by the Respondent to the court in pursuit of a restraining order against Rivas that his alleged conduct in

[5] Sec. 7 of the Act states that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

[6] The January 7, 1999 restraining order lists Respondent Plant Manager Jim Stewart, Production Superintendent Donnie Scott, and Labor Relations Manager Gayle Lucas as the "protected persons." The restraining order also specifies that Rivas is "[n]ot to telephone or contact employees during working hours."

question in the State court proceeding was based on the same conduct by Rivas that the General Counsel alleged was protected by the Act in the unfair labor practice proceeding. Thus, the Respondent's State court lawsuit was inextricably intertwined with activity that the General Counsel had determined was arguably protected by the Act. As stated above, the restraining order prohibited Rivas from engaging in protected concerted activity because he would be prohibited from coming within 50 yards of the Respondent's facility and contacting its employees during working hours. The unlawful discharge allegation also established that the General Counsel would be seeking Rivas' reinstatement, which is a standard remedy for an unlawful discharge, and would, of course, directly conflict with the terms of the restraining order. For all these reasons, the Respondent's postcomplaint pursuit of its State court lawsuit against Rivas interfered with Rivas' Section 7 rights.

In sum, under *Loehmann's Plaza I*, supra, upon issuance of the March 30, 1999 complaint, the Respondent was required to take affirmative action to have the restraining order of January 7, 1999 withdrawn within 7 days. Id. at 671. It is undisputed that the Respondent did not do this. Accordingly, I find that the Respondent's State court lawsuit violated the Act as alleged in the amended complaint.

Contrary to my colleagues' assertion, my position in this case is certainly not an attempt to force an employer to forego acting in response to alleged threats of violence, where the employer's allegations of such threats are honestly made, and not, as here, pretextual. My position, as fully explained above, is that the Respondent unlawfully refused to withdraw its December 23, 1998 State court lawsuit, imposing a restraining order against Rivas, upon the General Counsel's March 30, 1999 issuance of the instant unfair labor practice complaint, alleging that Rivas was discharged in violation of the Act. My colleagues mistakenly claim that my position turns the General Counsel into the ultimate arbiter of the merits of the State court restraining order. But in so arguing, my colleagues appear to have lost sight of the fact that the Respondent violated the Act by failing to stay or seek dissolution of the restraining order against Rivas following the issuance of the instant complaint *not because*, as it turned out, the lawsuit was falsely based on the Respondent's unsupported, pretextual assertions that Rivas threatened to engage in violence, *but because*, under *Loehmann's Plaza I*, supra, the Respondent's lawsuit was preempted from the time that the General Counsel issued the complaint.

Thus, in addition to disagreeing with my position, my colleagues have mischaracterized it.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal Labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge employees in order to discourage employees from engaging in concerted activities protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer Ramon Rivas full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Ramon Rivas for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Ramon Rivas, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL petition the court to withdraw the portion of the lawsuit in Case 98–185198 filed in Superior Court of California, County of Tulare, against Ramon Rivas prohibiting Rivas from entering our property and contacting our employees during working hours.

CHAMPION HOME BUILDERS

Valerie Hardy-Mahoney, for the General Counsel.
Robert W. Tollen (Seyfarth, Shaw, Fairweather & Geraldson), of San Francisco, California, for Respondent.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Visalia, California, on September 21 and 22, 1999. On January 7, 1999, Carpenters Union Local 1109, affiliated with United Brotherhood of Carpenters & Joiners of America, AFL–CIO (the Union) filed the original charge alleging that Champion Home Builders Co., a subsidiary of Champion Home Builders, Inc. (Respondent) committed certain violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Union filed an amended charge on March 26, 1999. On March 30, 1999, the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent alleging that Respondent violated Section 8(a)(1) of the Act. The Union filed a second amended charge on May 20, 1999. The Regional Director issued an amended complaint on September 3, 1999. The complaint was again amended at the hearing. Respondent filed timely answers to the complaints denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses [1] and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is a Michigan corporation with an office and place of business in Lindsay, California, where it has been engaged in the manufacture of mobile homes. During the 12 months prior to issuance of the complaint, Respondent purchased and received goods and services valued in excess of $50,000 from suppliers located outside the State of California. Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues

1. The facts

Ramon Rivas began working for Respondent in May 1996. Rivas worked as a finish carpenter in the tape and texture department. Respondent's employees are paid on an hourly basis. In addition, employees are paid a bonus based on meeting or exceeding certain production requirements.

Rivas was not satisfied with the bonus system. After discussing the matter with his coworkers, in January 1998, Rivas discussed the matter with his immediate supervisor, Salvatore Solis. Rivas complained that employees in the final department were working overtime and that the overtime payments reduced the amount of money which went into the bonus pool. According to Rivas, his bonus and that of other employees was reduced, while the earnings of final department employees were increased. Solis agreed with Rivas and suggested that Rivas bring the matter up at the next safety meeting. According to Rivas he was afraid to bring attention to himself at a meeting.

In June, the final department was reorganized and employees were reassigned. This change caused the final department employees to fall behind in their work. As a result, overtime was increased and the bonus payments to employees were decreased. Rivas spoke to between 20 and 30 employees about his dissatisfaction with the bonus system. He was asked to raise the matter at a safety meeting. In October, Rivas again discussed his unhappiness with the bonus system with his fellow employees. In early December, Rivas told two employees that the employees should contact a union to improve conditions. Rivas also stated that he was going to write a letter and put it in the suggestion box.

On December 11, 1998, Rivas left a letter in a little used suggestion box. The letter stated:

> We work hard Monday thru Friday on the line so we can keep our bonuses. We don't think it's fair for all of us that do keep up with our job, or better yet the line, that we get the same bonuses as those that don't. Because they did not earn it! But no, they get the same bonuses and even get rewarded by working Saturdays, getting time and a half and they work at they [sic] own pace because there is no line to push them to work faster. To top it off, they draw our bonuses down that we earned by working hard!
>
> We hope that you understand our point of view and trust that there will be something done about it.
>
> Sincerely,
> Champion Homes Workers

The suggestion box was not opened and Rivas received no response from the letter. On December 18, Rivas posted the letter on the company bulletin boards in the lunchroom and in the work area. Employees approached Rivas and asked whether he had written the letter. Rivas denied writing or posting the letter.

Donnie Scott, Respondent's production superintendent, saw the letter on the bulletin board. Later that morning, Scott and Gayle Lucas, labor relations manager,[2] met with five employ-

[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

[2] Lucas died prior to the instant hearing. I received in evidence Lucas' notes of meetings with employees. However, those notes were self-serving, do not appear to be accurate, and look as if they had been written in contemplation of litigation. The notes, written after Rivas' discharge, appear designed to justify and defend the discharge rather than to relate facts which occurred at various meetings. One passage contained in notes purportedly dated December 21, which illustrates Lucas' motivation in preparing the notes, states:

> At no time in our investigation and at no time in any of our conversations with Ramon or anyone else was the idea of a union

ees separately concerning the letter. According to Scott,[3] employee Elvira Fierro reported that Rivas had written the letter and posted it in the lunchroom. Fierro complained that the letter was unfair and that many employees disagreed with it. Fierro suggested that Rivas had written the letter because he had been required to finish some work in the final department the day before. Fierro said that Rivas had argued with other employees including Marco Alvarez.

Marco Alvarez also met with Scott and Lucas. Alvarez reported that Rivas had been required to finish some work in the final department the day before and was unhappy about it. Alvarez complained that Rivas was calling employees names and that Alvarez did not like it. Alvarez complained that someone was urinating in the toilets in the homes under construction and suggested that it was Rivas.

Employee Scott Floodman reported to Scott and Lucas that Rivas had been complaining for some time. Floodman said he thought that Rivas wrote the letter because he resented being sent to the final department to finish his work. Floodman also stated that Rivas had been complaining for sometime that other employees were getting overtime work.

Scott and Lucas called employee Jorge Esquivel into the office and asked about Rivas. Esquivel told Scott and Lucas that he and other employees did not agree with the letter. Esquivel said employees did not like Rivas and that Rivas was a troublemaker and a bully. He further stated that Rivas grabbed the behind of a female worker. Finally Scott and Lucas called employee Jim Duvall into the office and questioned him about Rivas. Duvall complained that Rivas liked to intimidate fellow employees. Duvall did not agree with the letter and said that Rivas should not have posted it.

After speaking with the five employees, Scott and Lucas spoke with Solis, Rivas' foreman. Solis said that he knew that Rivas was unhappy about being sent to the final department to finish his work but that was all he knew. Solis did not tell Scott and Lucas what he knew about Rivas' dissatisfaction with the bonus system. Although a supervisor, Solis was apparently afraid to truthfully answer questions about the dissatisfaction with the bonus system.

Scott and Lucas then called in Rivas. Scott handed Rivas the letter and asked what it was all about. Rivas said that he had nothing to do with the letter and had not even read it. Rivas did say that he agreed with the letter. Scott asked how Rivas could agree with the letter if he hadn't read it. Rivas repeated that he had not read the letter. Scott answered that several employees reported that Rivas had written the letter. Scott asked Rivas what he was so upset about. Scott handed Rivas his paycheck and said, "[Y]ou no longer work here." Rivas then admitted that he wrote the letter. Rivas told Scott that Scott could not fire him over the letter. Rivas said Scott needed a good reason to fire him. Scott replied, "I don't like the way you work. Now can I fire you?" Rivas asked to speak with Jim Stewart, Respondent's plant manager. Scott stated that Stewart would not be in until Monday.

Scott called Solis into the office to escort Rivas from the plant. Lucas told Rivas that he was not allowed to talk to any of the employees. Rivas told Scott and that he thought they were educated people, but he guessed that he was wrong. Scott asked if Rivas was complimenting them or insulting them. Rivas said they could take it anyway they wanted. Rivas was not given a written explanation for the termination.

On Monday, December 21, Rivas went to the facility to speak with Stewart. Scott approached Rivas and questioned why the employee was at the facility. Rivas answered that he was there to speak with Stewart and not Scott. Rivas said that as far as he was concerned Scott was a zero. Scott threatened to call the sheriff and Rivas told him to go ahead and call.

Sheriff Deputy Elio Saldivar arrived at the facility and was told by Scott that Rivas was to be escorted off the property. Scott told Saldivar that Rivas had been terminated and that Scott wanted him off the premises. Rivas told Saldivar that he had been improperly fired and that he was there to meet with Stewart. Scott said Stewart had not yet arrived at work. Saldivar advised Rivas to leave the property and to call and make an appointment with Stewart so that Rivas would have permission to enter the property. I find it revealing that Scott did not tell Saldivar that Rivas had made any threats to employees or supervisors.

Scott made no formal complaint and reported no threats to Saldivar. Saldivar testified that he observed no improper conduct on the part of Rivas. Rivas left the property and waited in his car for Stewart to arrive at work. When Rivas observed Stewart arrive at the plant, Rivas called Stewart on his cell phone. Stewart agreed that Rivas could come to see him at his office. When they met, Rivas told Stewart that this was going to be one of the hardest career decisions Stewart was going to have to make. Stewart answered that he didn't think so. Lucas joined them in Stewart's office. Rivas handed Stewart a copy of his letter regarding overtime and the bonus issue. Rivas contended that he was fired because of the letter. Stewart asked if anyone else agreed with the letter. Rivas answered that 50 or 60 employees agreed with him and Stewart asked for names. Rivas would not name any employees. Rivas said that if Stewart would not give him back his job, a judge would see that Rivas received pay for the next 35 years. Stewart replied that he did not like to be threatened. Rivas said that it was not a threat. Stewart said he would have given Rivas his job back had Rivas apologized. Rivas said that Stewart expected him to act without dignity and ask for forgiveness, but that Rivas had come in dressed for work and was ready to go back to work.

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even mentioned or considered. No kind of collective bargaining agreement was ever mentioned and no other employee at any time came to any supervisor either before or after this incident to indicate that anyone else had any kind of concerns. We believed then and do believe now that this whole situation was only about Ramon Rivas and any complaints he might have had against other employees.

That passage clearly indicates to me that Lucas was writing a memorandum designed to defend any litigation or charge brought against Respondent by Rivas or the Union. I do not find the normal attributes of trustworthiness found in business records. I do not credit nor rely on Lucas' notes. I found Rivas' testimony to be much more reliable than Lucas' notes or the testimony of Scott and Stewart.

[3] I found Scott to be a highly questionable witness and I am, therefore, reluctant to credit his testimony. I credit his testimony regarding the meetings with the five employees only because there is no testimony to the contrary.

Rivas apologized for the letter and said goodbye. Stewart asked where he could get in touch with Rivas to give a response about giving Rivas his job back. Rivas gave Stewart his phone number. Rivas shook hands with Stewart and Lucas and left.

After Rivas' termination, Stewart conducted a staff meeting at which he asked employees if they were aware that an employee had placed a letter on the bulletin board regarding bonuses. He said that the employee who had posted the letter was trying to imply that employees did not work hard for their money. He said he believed the employees did work very hard. He further stated that the employees should continue to work hard.

On December 23, Respondent sent Rivas a separation notice. The separation notice states that Rivas was discharged for improper conduct. Rivas was cited for falsification of company work records. According to Scott that was a reference to the fact that Rivas lied about writing the letter. Secondly, Rivas was cited for threatening physical harm or intimidating a supervisor. According to Scott, Rivas threatened him on December 18. Rivas was cited for interrupting employees at their work and posting a notice on the bulletin board without permission. Scott admitted that Rivas was not fired for interrupting employees or posting on the bulletin board. According to Scott, Rivas was fired for threatening people with bodily harm and lying about the letter. According to Stewart, Rivas was fired for threatening people with bodily harm.

On December 24, Rivas was served with a temporary restraining order prohibiting him from coming within 100 yards of Respondent's facility or contacting Stewart or any of Respondent's employees. In his papers seeking an injunction, Stewart made no mention of Rivas allegedly threatening Scott or Lucas. Rather he alleged that Rivas intimidated employees by implying that certain employees did not deserve their bonuses. Stewart attached a copy of the letter addressing concerns with the bonus system. Stewart alleged that Rivas said there would be consequences if Stewart did not reconsider the discharge. However, the consequences were not bodily harm as claimed herein, but rather the threat of a lawsuit. Stewart claimed that Rivas was discharged as of December 22. Finally, Stewart claimed a fear that the defendant (Rivas) might go "postal." On January 7, 1999, the Superior Court for Tulare County granted a restraining order in Case 98–185198 prohibiting Rivas from being within 50 yards of Respondent's facility and contacting Respondent's employees during working hours.[4] Again, I find it significant that Stewart's papers filed in the California State Court do not allege any threats of bodily harm. At the hearing, Stewart testified that threats of bodily harm were the reason for the discharge.

By letter dated September 1, 1999, the Regional Director demanded that Respondent ask the Superior Court to withdraw the restraining order. By letter dated September 2, 1999, Respondent refused the Director's demand. On September 3, the Director issued an amended complaint alleging that Respondent violated Section 8(a)(1) of the Act by failing and refusing to seek a dissolution of the restraining order.

[4] The restraining order expires on January 7, 2002.

B. Conclusions

Under Section 7 of the Act employees have the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Employees having no bargaining representative and no established procedure for presenting their grievances may take action to spotlight their complaint and obtain a remedy. *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 12–15 (1962). The protection of the protected activity does not depend upon the merit or lack of merit of the grievance. *Skrl Die Casting*, 222 NLRB 85, 89 (1976). In this case, Rivas was engaged in protected concerted activities when he complained to other employees about the bonus system, a component of the workers' wages. These discussions and the subsequent posting of the letter were taken in an effort to protest and change the bonus system. A discharge of an employee for engaging in such action violates Section 7 of the Act.

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp*., 462 U.S. 393, 399–403 (1983). In *Manno Electric,* 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows:

> [The General Counsel has the burden] to persuade that anti-union sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.

It has long been held that there are five principal elements that constitute a prima facie case insofar as Section 8(a)(3) and (1) are concerned. The first is that the employee alleged to be unlawfully disciplined must have engaged in union or protected activities. The second is that the employer knew about those protected activities. Third, there must be evidence that the employer harbored animus against those individuals because of such activities. Fourth, the employer must discriminate in terms of employment. Finally, the discipline must usually be connected to the protected activity in terms of timing. See, e.g., *Goodyear Tire & Rubber Co.,* 312 NLRB 674 (1993).

For the following reasons, I find that General Counsel has made a strong prima facie showing that Respondent was motivated by unlawful considerations in discharging Rivas. First, Rivas was engaged in protected concerted activities and Respondent became aware of such activities on the morning of the discharge. Upon discovering that Rivas had posted the offending letter, Scott and Lucas questioned employees about Rivas. Scott and Lucas then questioned Rivas about the letter. Scott discharged Rivas after Rivas refused to answer questions about the letter. Rivas said that was not sufficient grounds for dis-

charge and Scott then said that Rivas was discharged because Scott did not like Rivas' work.

When Rivas spoke to Stewart about regaining his job, Stewart also questioned Rivas about the letter. When Rivas refused to name other employees who agreed with Rivas regarding the bonuses, Stewart told Rivas that the discharge decision would not be reversed.

Respondent's reasons for the discharge buttress the strong prima facie case. Respondent alleges that Rivas intimidated other employees. However, the contention is that he intimidated employees by writing a letter criticizing certain employees and signing the letter as if it was written on behalf of all employees. Thus, Respondent is contending that Rivas intimidated employees by engaging in protected activities. Further, Respondent falsely contends that Rivas threatened its supervisors. The only threat Rivas made was to sue Respondent or file charges due to the discharge. If a stated reason for a discharge is false, an inference can be drawn that the employer desires to conceal an unlawful motive. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

The burden shifts to Respondent to establish that the same action would have taken place in the absence of Rivas' protected activities. Respondent has not met its burden under *Wright Line.* Its assertion that Rivas threatened employees and supervisors has been found to be false and unlawfully motivated. Further, Respondent cannot rely on Rivas' failure to confess to his protected concerted activities as a ground for the discharge.

Accordingly, I find that the termination of Rivas was motivated by the employee's protected concerted activities and that Respondent has not established that it would have discharged Rivas absent that protected conduct. Thus, I find that Respondent has failed to carry its burden under *Wright Line* and that the discharge of Ramon Rivas violated Section 8(a)(1) of the Act. See *Bronco Wine Co*., 253 NLRB 53 (1981); *Hunter Douglas, Inc*., 277 NLRB 1179 (1985).

In *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the United States Supreme Court held that "the Board may not halt the prosecution of a state court lawsuit, regardless of the plaintiff's [retaliatory] motive, unless the suit lacks a reasonable basis in fact or law." 461 U.S. at 748. The Court also held that if the employer's case in the state court ultimately proves meritorious and he has judgment against the [employee], the employer should also prevail before the Board, for the filing of a meritorious lawsuit, even for retaliatory motive, is not an unfair labor practice. 461 U.S. at 747.

The General Counsel argues that this case falls within an exception to *Bill Johnson's*. In *Bill Johnson's*, 461 U.S. at 738 fn. 5, the Court noted that case involved an employer's lawsuit that Federal law would not bar except for its allegedly retaliatory motivation. The Court distinguished such suits from suits "beyond the jurisdiction of the state court because of federal-law preemption" or that have objectives that are "illegal under federal law." General Counsel cites *Loehmann's Plaza*, 305 NLRB 663, 669–671 (1991), for the proposition that where the General Counsel has issued complaint, having found sufficient evidence that arguably protected activity is involved, and where a lawsuit is directed at that arguably protected activity, that lawsuit is preempted and unlawful due to its tendency to interfere with Section 7 activity, without regard to retaliatory motive.

In *Loehmann's Plaza*, the Board specifically held that the employer's state court injunction enjoining a union from picketing near a shopping mall store and limiting the number of picketers, was preempted by the Act when the General Counsel issued complaint alleging unlawful interference with the union's protected right to picket. The Board expressly noted that its holding does not frustrate a State's proper concern for maintaining domestic peace because, "In issuing a complaint alleging interference with protected activity, the General Counsel has made a determination that unprotected activity, such as violent or mass picketing, is not present." Id. at 671.

In the instant case, the state court granted the injunction. Thus, I cannot find that the lawsuit lacked merit. However, I have found, pursuant to the complaint, that Respondent has unlawfully discharged Ramon Rivas. The remedy for such an unfair labor practice includes reinstatement and backpay. I further find that Rivas has not engaged in any conduct which would bar a reinstatement order.

The issue becomes whether the injunction which conflicts with reinstatement is preempted by the Act. In *American Pacific Concrete Pipe Co.,* 292 NLRB 1261 (1989), the Board found that its jurisdiction to decide backpay claims preempted the Respondent's suit pertaining to the same subject matter. The Board cited the Supreme Court's decision in *Building Trades Council of San Diego v. Garman*, 359 U.S. 236, 244–245 (1959), where the Court held:

> When an activity is arguably subject to Section 7 of the Act, the States as well as the Federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

In the instant case, the issue before the state court was not identical to that before the Board. However, the state court's injunction does interfere with the remedy in this unfair labor practice case. Under Section 10(c) of the Act, the Board has the authority to determine and to administer appropriate remedies for unfair labor practices and to "take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of the Act. *American Pacific Concrete Pipe Co.,* supra at 1262. The Board's exclusive jurisdiction to decide whether Respondent committed an unfair labor practice and to remedy such unfair labor practice preempts the state court injunction which bars Rivas from entering Respondent's property.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging Ramon Rivas because of his protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

4. By not withdrawing its lawsuit filed in the Superior Court of California, County of Tulare, in Case 98–185198, after issuance of the amended complaint, Respondent violated Section 8(a)(1) of the Act.

5. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

I shall recommend that Respondent offer Ramon Rivas full and immediate reinstatement to the position he would have held, but for his unlawful discharge. Further, Respondent shall be directed to make Rivas whole for any and all loss of earnings and other rights, benefits, and privileges of employment he may have suffered by reason of Respondent's discrimination against him, with interest. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp*., 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 139 NLRB 716 (1962).

Respondent shall also be required to expunge any and all references to its unlawful warning and discharge of Rivas from its files and notify Rivas in writing that this has been done and that the unlawful discipline will not be the basis for any adverse action against him in the future. *Sterling Sugars, Inc*., 261 NLRB 472 (1982).

Finally Respondent shall be required to withdraw its lawsuit filed in the state court against Ramon Rivas.

[Recommended Order omitted from publication.]